Supreme Court of the United States.

No. ~~661~~ 297, October Term, 1897. 8

JOSEPH BRADFIELD, Appellant, v. ELLIS H. ROBERTS, Treasurer of the United States.	Case No. 16,874.

Appellant's Brief.

I. STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, in Equity No. 782, reversing with costs the decree of the Supreme Court of the District of Columbia, in Equity No. 18822, enjoining the defendant, as Treasurer of the United States, from paying any moneys belonging to the United States or the District of Columbia, to the directors of Providence Hospital or to any person for their benefit, under an agreement, purporting to be a contract, between "Sister Beatrice" and the Commissioners of said District; and remanding the cause with direction to dismiss the bill.

The bill was filed, Nov. 17, 1897, by Joseph Bradfield, "a citizen and tax-payer of the United States, and a resident of the District of Columbia, in the interest of himself and all other citizens of the United States similarly situated," against "Ellis H. Roberts, Treasurer of the United States;" the grounds of action being stated therein as follows:

"3. That the object of this suit is to procure an order of this court enjoining and restraining the said defendant from paying or delivering to any officer or agent of Providence hospital or the directors of Providence hospital of the city of Washington, District of Columbia, or to any person whatever for the use and benefit of the same, any money or moneys belonging to the United States or to the District of Columbia, upon and by virtue of an agreement or contract between the Surgeon General of the Army and the directors of said hospital or their agents, under color of an authority to provide "for the support and medical treatment of ninety-five medical and surgical patients, who are destitute, in the city of Washington, under a contract to be made with the Surgeon General of the Army," contained in the sundry civil act approved June 4, 1897, or by virtue of the agreement between the Commissioners of the District of Columbia and the directors of said hospital, made and entered into the 16th day of August, 1897, a copy of which is herewith filed as a part of this bill and marked "Exhibit A," wherein it is provided "that they (the said Commissioners) will erect on the grounds of said hospital an isolating building or ward for the treatment of minor contagious diseases, said building or ward to be erected without expense to said hospital except such as it may elect, but to be paid for out of an appropriation for that purpose contained in the District appropriation bill approved March 3, 1897, on plans to be furnished by said Commissioners and approved by the health officer of the District of Columbia, and that when the said building or ward is fully completed it shall be turned over to the officers of Providence hospital."

"4. That the said Providence hospital is a private eleemosynary corporation, and that to the best of complainant's knowledge and belief it is composed of members of a monastic order or sisterhood of the Roman Catholic church and is conducted under the auspices of said church; that the title to its property is vested in the "Sisters of

Charity of Emmitsburg, Maryland;" that it was incorporated by a special act of Congress approved April 8, 1864, whereby, in addition to the usual powers of bodies corporate and politic, it was invested specially with "full power and all the rights of opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may *place themselves* under the treatment and care of said corporation."

"5. That in view of the sectarian character of said Providence hospital and the specific and limited object of its creation, the said contract between the same and the Surgeon General of the Army and also the said *agreement* between the same and the Commissioners of the District of Columbia are unauthorized by law and, moreover, involve a principle and a precedent for the appropriation of the funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment, and also a precedent for giving to religious societies a legal agency in carrying into effect a public and civil duty which would, if once established, speedily obliterate the essential distinction between civil and religious functions."

"6. That the complainant and all other citizens and taxpayers of the United States are injured by reason of the said contract and the said agreement, in virtue whereof the public funds are being used and pledged for the advancement and support of a private and sectarian corporation, and that they will suffer irreparable damage if the same are allowed to be carried into full effect by means of payments made through or by the said defendant out of the Treasury of the United States, contrary to the Constitution and declared policy of the Government."

The material part of the prayer was as follows:

"2. That the said Ellis H. Roberts, Treasurer of the

United States, as aforesaid, his agents and assistants and his and their successors in office, be enjoined and restrained by the order of this honorable court from paying or delivering any money or moneys of the United States or of the District of Columbia to the said directors of Providence hospital, their agents, attorneys, employees, or servants, as if there were no contract between the Surgeon General of the Army and said corporation or between the Commissioners of the District of Columbia and the same, any warrant drawn by the Secretary of the Treasury, or any precedent, or any pretended authority of an act of Congress in any way relating to or concerning the said corporation, its property or business, to the contrary notwithstanding."

"3. That the complainant may have such other and further relief in the premises as the nature of the case may require."

There was a general demurrer by the defendant, to which the plaintiff filed a joinder in demurrer; and the case was, by consent of parties set for trial on the 16th of December, 1897; at which time it was argued by the plaintiff in person and by defendant's counsel, Mr. Henry E. Davis and Mr. D. W. Baker.

On the 3d of February, 1898, Mr. Justice Hagner filed the following decree in the cause:

"This cause came on for hearing upon the bill and demurrer and was argued by the respective counsel and considered by the court.

It is thereupon, this 3d day of February, 1898, by this court and the authority thereof, adjudged, ordered, and decreed that the defendant, as Treasurer of the United States, be, and is hereby, enjoined and strictly forbidden to pay over any moneys of the United States or of the District of Columbia to the Providence hospital, or to the directors or to any officer or agent thereof, by virtue of or under any

claim that may be made for such payment under the *agreement* made by the Commissioners of the District of Columbia and the president of said hospital, set forth and described in the proceedings in this cause, dated 16 August, 1897."

From this decree the defendant appealed to the Court of Appeals of the District of Columbia, which by its decree, filed April 4, 1898, reversed the decree of the court below with costs, and remanded the cause with directions to dismiss the bill; whereupon the plaintiff, having been allowed an appeal to this court, for error assigns the following:

II. ASSIGNMENT OF ERRORS.

1. The Court of Appeals of the District of Columbia erred in assuming that the negative and self-executing provision of the Constitution of the United States, which provides that "Congress shall make no law respecting an establishment of religion," does not bind all the officers of the United States, including the defendant in this case, to refrain from paying or delivering to a corporation composed of Sisters of Charity, moneys in their possession belonging to the United States.

2. The Court erred in "regarding the bill as directed against Ellis H. Roberts, not as the Treasurer and representative of the United States, but as, *ex-officio*, the representative—treasurer, so to speak, of the District of Columbia, and, as such, charged by law with the duty of paying out the money thereof under the contract made with its representatives;" the defendant, Roberts, being "sued as the Treasurer of the United States," with reference to the disposition of moneys belonging to the United States as a public corporation composed of the people of the United States, as well as with reference to the disposition of moneys belonging to said District, which was created by an act of Congress, and is subject to the Constitution of the United States as the supreme law of the land.

3. The Court erred in assuming that the District of

Columbia, as a municipal corporation, so created and so bound, has the power to make contracts to bind itself, except *in pursuance* of appropriations made by law, or until such appropriations have actually been made.

4. The Court erred in assuming that this is merely a suit to annul a contract; it being in reality a suit to restrain the defendant, as treasurer of the United States, from violating his official oath and covenant in respect to the application of moneys of the United States and the District of Columbia to a private and sectarian corporation.

5. The Court erred in deciding that a private corporation composed of nuns, though that fact does not appear in its charter of incorporation, may contract with the agents of the Government to receive compensation for actual services *to be rendered*.

6. The Court erred in assuming that "Sister Beatrice," by that title or designation, could be made a party to this suit without a palpable violation of the Constitution of the United States in respect to titles of nobility; and that the paper writing signed: "Sister Beatrice, President of Providence Hospital," etc., which is set forth in the bill and also in the opinion of the Court, is a contract binding upon "The Directors of Providence Hospital," or upon the District of Columbia, under the Constitution and laws of the United States.

7. The Court erred in assuming that the promise of the District of Columbia to pay to a corporation of nuns, moneys to be appropriated by Congress *in futuro*, for services yet to be rendered, in keeping poor patients and prisoners held on the charge of having some "minor contagious disease," on the one hand; and the promise to maintain a "neutral zone" around the isolating building, or hospital-prison provided for, and to keep and nurse said poor patients and prisoners, on the other; constitute such a contract as to entitle the parties thereto to a standing in court

in this case; such a compact being a clear violation of law upon its face, and plainly an attempt to secure judicial recognition of an ecclesiastical title, as well as of the doctrine and right of asylum, as the same were established in the States of the Church.

8. The Court erred in failing to construe the mortmain clause of the Federal Constitution in the light of the English laws of mortmain and charitable uses, whose principles it embodies.

9. The Court erred in assuming that Congress has power to make gifts in mortmain, of lands, or houses to be built on lands, or money to be laid out in lands or improvements, with or without a *quid pro quo*, real or feigned; the prerogative right and power to grant licenses in mortmain, together with all the incidents of such a power, having been denied to Congress and reserved to the States by the First and Tenth Amendments to the Constitution.

10. The Court erred in assuming that Congress may do *per obliquum* what it has not the power to do *per directum*.

11. The Court erred in deciding that the interpretation of the Constitutional policy of the Government contained in the declaration of Congress set forth in the bill, and also in the opinion of the Court (Stat. p. 683) to wit: "It is hereby declared to be the policy of the United States, to make no appropriations of money or property, for the purpose of founding, maintaining, or aiding, *by payment for services*, expenses or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control,"—did not affect the acts of officers of the United States in respect to the application of moneys appropriated in the same act.

12. Finally, the Court erred in reversing the decree of the Supreme Court of the District of Columbia, and in remanding the cause with direction to dismiss the bill:

and also in refusing to restrain the defendant from delivering to Providence Hospital or its agents, the moneys appropriated to the said Hospital in the Sundry Civil Act of 1897; which it should have done upon the first opportunity, lest by judicial acquiescence in the usurpation of unauthorized and forbiddeu powers, by Congress and its agents, the wrong became inveterate by repitition.

III. PRINCIPLES AND AUTHORITIES.

The object in construing a constitution is to ascertain the meaning of its framers, and give affect to their intention In the clause under consideration, the thing predicated of Congress is a mandatory denial of the right to make any law respecting any establishment, of or concerning religion; and that denial is predicated universally—in its broadest possible sense, without any limitation or exception whatever. Every religious establishment or institution is included in the category with reference to which lawmaking is absolutely prohibited, and is excluded from that in respect to which Congress has been granted the power of legislation. *Ita lex scripta est.* The category of things prohibited is more comprehensive than similar categories in the State Constitutions. And while the subject has not heretofore been brought for direct adjudication before this Court, yet what Congress would be restrained from doing under the First Amendment can best be conjectured from a comparison of the numerous cases which have arisen under similar prohibitions in State Constitutions. The language of these Constitutions, though often much more explicit in forbidding aid to sectarian institutions, could not cover any more ground than the general words of the Federal Constitution. As the State courts have almost always been very strict in condemning any sort of State aid to a school or charity under the control of any religious sect, so also it seems likely that the Federal

courts, if occasion shall arise, will be strict in applying the prohibitions of the First Amendment.

State *v.* Hallock, 16 Nevada, 373.
Synod *v.* State, 2 South Dakota, 366.
Farmer *v.* St. Paul, 67 N. W. Rep., 990.
County of Cook *v.* Chicago Industrial School for Girls, 125 Ill., 540.
Cooley's Const. Lim., 54.
State *ex rel.* Orr *v.* New Orleans, La., An. Rep. for Feb. 1898.

The meaning of the framers of the Constitution of the Union is made equally clear by reference to their own writings and those of their contemporaries.

Opinion of John Adams, 7 Jefferson's Works, 396.
" " Jefferson, 8 id, 113, 136, 137.
" " Jefferson, 5 id, 236, 237.
" " Jefferson, 12 Hening's Statutes, 80.
" " Hamilton, 2 Hamilton's Works, 25, 26, 127
" " Madison, Veto Messages, 11, 12. [to 138.
" " Madison, Journal of Gen. Assembly, 1785.
" " John Jay, The Federalist, Nos. 3, 46, 47, 48.
" " Franklin, 2 Franklin's Works, 192, 193, 195, 202, 203.

The meaning of an idea or principle is its history. It can have no other. To conjecture without the light of experience is to deal in fiction and not in philosophy. Therefore, constitutions and statutes are to be construed in the light of previous history and surrounding circumstances.

Cooley's Const. Lim., 65.
Mattox *v.* U. S., 156 U. S. 237.
Dred Scott *v.* Sanford, 19 Howard, 394.
Kennedy *v.* Gies, 25 Mich., 83.
State *v.* Hallock, 16 Nevada, 373.

Hence the prior state of the law is to be considered as most likely to furnish the clue to the real meaning of an

ambiguous provision; and it is especially important to look into it if the Constitution is the successor of another, and *in the particular* in question essential changes have apparently been made.

Cooley's Const. Lim., 65.
The Federalist, No. 46.

The clause under consideration was intended to incorporate and fix in our jurisprudence the principles of the law of charitable uses, including the law of mortmain, as the chief guarantee of those primordial rights which the Anglo-Saxon race had inherited and defended since the times of Magna Charta. It is the principle of which those rights are consequences, and without which kingcraft and priestcraft would easily destroy them; it being absurd to hope for freedom of thought, or of speech, or of the press, or of assembly; if the clergy were allowed to influence legislation in their own special interest; or to accumulate and hold in perpetuity, either in their own right or as beneficiaries, such vast estates as might enable them to control the channels of information and the minds of the multitude. The clauses, securing those rights were, therefore grouped in one and the same sentence with the all-important principle that Congress shall neither create a religious establishment, nor recognize in any manner such as already existed. "No man shall be compelled to frequent or *support any religious worship, place or ministry whatsoever.*" This is the form in which Jefferson couched the principle in 1785; and Madison afterwards framed it in the words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This circumstance suggests the proper interpretation of the latter clause. All that the plaintiff contends for is, that no man shall be compelled by taxation to *support a religious place*, directly, and a religious worship and ministry, indirectly. It is conceded, by the demurrer, that the Hospital in

question is a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church; that the title to its property is vested in said order or sisterhood. It must therefore be a religious place, a religious establishment, a religious house, an institution under sectarian and ecclesiastical control. If the proposed building were erected, it would be the property of the sisterhood. The payment would be in aid of an institution or society which is under sectarian and ecclesiastical control, and no more flagrant and palpable violation of the Constitutional inhibition; no more glaring perversion of the act authorizing the erection of such a building in some proper place, could possibly be conjectured.

The Federal Government, like a municipal corporation, is possessed only of delegated powers; and while it has, as the immediate government of the District of Columbia and the Territories, ample powers delegated to it to provide for the foundlings, the insane, the indigent, infirm and helpless, and for the correction of the vicious and vagrant portions of its population, *such provision, where made, must be wholly under the control and supervision of its own officers and agents.* It can levy no taxes, general or special, upon *the inhabitants* or their property, unless the power be plainly and *unmistakably conferred.* The authority must be given either in express words, or by necessary implication; and *it cannot be collected by doubtful inferences from other powers,* or powers relating to other subjects, *nor deduced from any consideration of convenience or advantage.*

Congress cannot exercise the powers delegated to it, in such a way as to surrender or suspend the constitutional right of any citizen to exemption from taxation for purposes proscribed by the framers of the Constitution in that instrument. And it has been held in numerous cases, that a court of equity will interfere whenever unauthorized or forbidden legislation is sought to be made effective by a

ministerial act; and will in such a case enjoin the ministerial officer.

City of Valparaiso *v.* Gardner, 97 Ind., 1.
New London *v.* Brainard, 22 Conn., 552.
Webster *v.* Harwinton, 32 Conn., 131.
Crampton *v.* Zabriskie, 101 U. S., 661.
Cooley on Taxation, 548.
Baltimore *v.* Gill, 31 Md., 375.
Mormon Church Cases, 136 U. S., 1.
Calder *v.* Bruce, 3 Dallas, 386.

In the last named case, Mr. Justice Chase dwelt at some length upon the nature of the primordial rights and denied that any government could take the money of A and give it to B without any consideration, or for an unlawful consideration. Said he,

"The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of legislative power, they will decide what are the proper objects of it; and the nature and end of legislative power will limit it. There are acts which Federal and State legislatures cannot do without exceeding their authority. There are certain vital principles which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to *take away that security for personal liberty or private property*, for the protection of which governments are instituted. An act of the legislature contrary to the great principles of the social compact, *cannot* be considered a rightful exercise of legislative authority. The obligations of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A law that punishes a citizen for an innocent action, that impairs or destroys the lawful private contract of the citizen, that makes a man judge in his own case, or *that takes property*

from A and gives it to B, is against all reason and justice; and, therefore, if there was no restriction in the Constitution against such acts, it could not be presumed that the people had entrusted such power to the legislature." See also

Minturn *v.* Larue, 23 Howard, 435.
Loan Asso. *v.* Topeka, 20 Wall, 658.

The plaintiff therefore insists that the acts of Congress under which money has been paid and is likely still to be paid out of the Treasury of the United States by the defendant are void for three reasons:

1st. Such acts are void because they are forbidden by Article 1, of the Amendments to the Constitution.

2d. They are a violation of the reserved rights of the States and the people.

3d. They are a violation of the social compact and of natural right.

The same views were held by President Jefferson. In his letter to Rev. Mr. Millar, dated Jan. 23, 1808, he used this language:

"I consider the Government of the United States as interdicted by the Constitution from all intermeddling with religious institutions, their doctrines, discipline, or exercises." And the reason he gives for this opinion is twofold: "This results not only from the provision that *no law shall be made* respecting the establishment or free exercise of religion; but from that also which reserves to the States the powers not delegated to the United States." This is precisely the claim of the plaintiff in this case. When such a claim was met by the citation of instances based on a contrary principle, Jefferson replied: "I am aware that the practice of my predecessors may be quoted. *But I have ever believed that the example of State executives* led to the *assumption* of that authority by the General Government, without *due*

examination; which would have discovered that what might be right in a State Government, was a violation of that right when assumed by another. Civil powers alone have been given to the President of the United States." (5 Jefferson's Works, 236.) See also 3 Howard 589, 109 U. S. 398. 9 Cranch, 43.

This letter was written in reply to a request that the President should recommend a day to be observed as a day of fasting and prayer. But it is therefore a stronger, and not a milder assertion of the construction contended for, than the two veto messages of President Madison which are relied upon by the plaintiff; for, surely, it is a stronger expression to say that the Government shall not *meddle* with religious institutions or exercisrs, than to say, that it *shall not compel citizens to contribute their money for the propagation of opinions which they disbelieve;* which is the substance of President Madison's contention. The latter proposition is only a part of the former, only one of the particulars of a system of natural rights.

It is impossible that a power to collect money by taxation to be used in advancing the interests of a monastic order, even under color of a contract, could have been smuggled into the Constitution, under the general welfale clause or "the sweeping clause." Mr. Madison says:

"A power to impose unlimited taxes for unlimited purposes could never have escaped the sagacity and jealousy which were awakened to the minute powers that were criticised and combated in those public bodies." (The State Conventions.)—4 Madison's Writings, 134.

"The Constitution is a limited one, possessing no power not actually given, and carrying on the face of it a distrust of power beyond the distrust indicated by the ordinary forms of free government."—4 id. 135.

"There is a broad distinction between an abuse of a power actually delegated to Congress, and the usurpation of a power not delegated."—4 id. 230.

"The constitutional control of Congress in applying surplus moneys in the Treasury to constitutional objects is in the responsibility of that body to its constituents. But as to appropriations to unconstitutional objects, it is otherwise."—4 id. 239.

In the case of Permoli *v.* First Municipality, 3 Howard, 589, Mr. Justice Catron, who delivered the opinion of the court, said: "The Constitution (of the United States) makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State Constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States."

In Terret *v.* Taylor, 9 Cranch, 43, Mr. Justice Story, in the course of his remarks (p. 49) said: "Consistant with the Constitution of Virginia the legislature could not create or continue *a religious establishment* which should have exclusive rights and prerogatives; or compel the citizens to worship under a stipulated form of discipline; or *to pay taxes* to those whose creed they could not conscientiously believe.

"The revolution might *justly* take away *the public patronage*, the exclusive cure of souls, and the *compulsive taxation for the support of the church*."

In Memphis Gaslight Co. *v.* Shelby County, 109 U. S. 398, this court held that "The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the States. That is left to the state constitution and state laws." Now, surely, if Congress cannot protect the religious liberties of citizens in the States; if Virginia and the other States can make laws taking away compulsive taxation for the support of a church; if Congress cannot even protect the property of religious corporations acquired since the Revolution from taxation to the extent of confiscation; then it must follow that Congress cannot lawfully take by taxation the money of the

Baptist citizens of Virginia and bestow it upon the Sisters of Charity of Emmetsburg, Maryland, either by improving their real estate in Washington, or their convent at Emmetsburg.

In the Charles River Bridge Case, 11 Peters, 547, Chief Justice Taney said that in grants affecting the public interest "nothing passes by implication."

It is not enough therefore to say that such a case as the present was not in the mind of the First Congress when the First Amendment was framed, nor of the American people when it was adopted. It is necessary to go further and say that, had this particular case been suggested, the language would have been so varied that it would have been made a special exception. The case being within the spirit of the rule must be within its operation likewise.

If it be true that the Constitution should have been so framed that an appropriation to charitable uses of the kind in question could be made, the instrument defines the way for its amendment. But to hold that Congress can make such appropriations under the Constitution, or that the Treasurer can lawfully pay money in pursuance of them, would be to substitute for the law intended by the framers of that instrument, another law entirely different, and one which they would never have been willing by itself to enact.

Another principle is important in this connection. "Though a law may be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yo Hick *v.* Hopkins, 118 U. S. 356.

In the Act for Establishing Religious Freedom in Virginia (anno 1785) it is provided:

"That *no man* shall be compelled to frequent or *support* any religious worship, *place*, or ministry whatsoever; nor shall be enforced, restrained, molested, or *burdened*, in his body or *goods*, nor shall otherwise suffer, on account of his religious opinions or belief; but that *all men* shall be free to profess, and by argument to maintain, their opinions in matters of religion; and that the same shall in no wise diminish, enlarge, or affect their civil capacities."

"The rights hereby asserted are the natural rights of mankind; and if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

12 Hening's Statutes, 84.

Would Virginia have delegated to Congress the power to annul this act? If not, then every act of Congress appropriating money to sectarian institutions is *ultra vires*. Some of the money so appropriated is contributed by citizens of Virginia, and is an infringement of their natural rights. "To compel a man to make contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

In his "Remarks on the Quebec Act," 2 Hamilton's Works, 131-5, Alexander Hamilton says: "The characteristic difference between a tolerated and an established religion consists in this: With respect to the *support* of the former, the law is passive and improvident, leaving it to those who profess it, to make as much or as little provision as they shall judge expedient; and to vary and alter that provision as their circumstances may require. In this manner the Presbyterians and other sects are tolerated in England. They are allowed to exercise their religion without molestation, and to maintain their clergy as they think proper. These are dependent upon their congregations and can exact no more than they stipulate and are satisfied to contribute."

"But with respect to the *support* of the latter (an established religion,) the law is active and provident. Certain precise dues, (tithes, etc.,) are *legally* annexed to the clerical office, independent of the liberal contributions of the people; which is exactly the case with the Canadian priests; and, therefore, no reasonable, impartial man, will doubt that the Church of Rome is established in Canada."

"While tithes were the free, though customary, gift of the people, as was the case before the passing of the Act in question, the Roman Church was only in a state of toleration; but when the law came to take cognizance of them, and, by determining their permanent existence, destroyed the free agency of the people; it then resumed the nature of an establishment, which it had been divested of at the time of the *capitulation*."

(Hamilton's Works, vol. ii, pp, 132-3-4.)

(id. p. 135.) . . "Had there been really provision made, to be applied at the discretion of his Majesty, I should still consider this act as an *atrocious infraction of the rights of Englishmen*, in a point of the most delicate and momentous concern. No Protestant Englishman would consent to let the free exercise of his religion depend upon the mere pleasure of any man, however great or exalted. The privilege of worshipping the Deity, in the manner his conscience dictates, which is one of the dearest he enjoys, must, in that case, be rendered insecure and precarious. Yet this is the unhappy condition to which the Protestant inhabitants of Canada are now reduced."

"The will of the King must give law to their consciences. It is in his power to keep them forever dispossessed of all religious immunities; and there is too much reason to apprehend that the same motives which instigated the Act would induce him to give as little future encouragement as possible."

"I imagine it will clearly appear from what has been offered, that *the Roman Catholic religion, instead of being tolerated*, as stipulated by the Treaty of Peace, *is established by the Late Act;* and that the Protestant religion has been left entirely destitute and unbefriended in Canada."

That our Anglo-American ancestors were accustomed to regard the payment of taxes for the support of a religion as iniquitous, is evident from the whole course of events which led up to the Revolution. The case of James Maury against the tax collector of Hanover County in Virginia, tried at November term, 1763, of Hanover County Court, furnishes a clue to their sentiments on this subject; which cannot be disregarded. As far back as 1696, the legislature of Virginia had allowed a stipend to the ministers of the Protestant Episcopal Church in Virginia. In 1758 the legislature passed an act temporarily exempting the tax payers from the usual assessment, because of bad crops. The clergy appealed to the Archbishop of Canterbury and the King to restore them their rights; and the Act of 1758 was declared void by the King in Council. The Reverend James Maury thereupon brought a suit for damages against the collector of Hanover for his failure to collect and pay over Maury's stipend. Patrick Henry appeared for the defendant, and the jury allowed Maury one penny as damages.

An account of Maury's case will be found in Anderson's Colonial Church, vol. 2, pp. 233 to 241. On Page 240, Anderson says.

"The claim of the clergy could not have been defeated by any other means than by a sort of revolutionary recurrence to fundamental principles, by an abnegation of the regal authority, and an exertion of popular sovereignty. Nothing less, in fact, than this was involved in the issue of the present trial (Maury's case): It antedated the American Revolution. However different the disputes which, in

a few years afterwards, brought about that event, there can be no doubt that the spirit which carried the American Colonies triumphantly through them all, was the spirit evoked by Patrick Henry in the court-house of Hanover County."

It was eleven years after this celebrated trial, in which,

"The forest-born Demosthenes,
Whose thunders shook the Philip of the seas,"

had declared the principle of natural right, before the Quebec Act was passed, anno 1774. (14 Geo. iii, ch. 83. 12 British Statutes at Large, 184.)

By reference to that act, it will be seen that it was calculated to arouse the Republican spirit to the pitch of rebellion.

Section 4 recited that the English system of civil government had been found, upon experience, to be incompatible to the state and circumstances of the said province, the inhabitants whereof amounted at the conquest to above 65,000 persons professing the religion of the Church of Rome, enjoying an established form of constitution and system of laws "suitable to their religious condition," and provided that the said form of constitution and system of laws should be assured to the people of Quebec.

Section 5 provided that all British subjects in Quebec, "professing the religion of the Church of Rome, shall have hold, and enjoy the free exercise of the religion of that church; and that the clergy of that church may hold, receive and enjoy *their accustomed dues and rights*."

Section 7 provided "that no person professing the religion of the Church of Rome and residing in said province, shall be obliged to take the oath required by the Statute of the First Elizabeth, or any other oath substituted by any other statute in place thereof," etc.

Section 10 abrogated all the provisions of the English law relating to mortmain and charitable uses.

Section 11 provided for retaining the criminal code of England and the practice conformable to it, except as the same might be modified to conform to the condition of the Canadians.

It was the Quebec act which proved the immediate cause of the Revolution. The first outburst of indignation against that act is found in the famous Suffolk resolves, the tenth section of which is couched in these words:

"10. That the late Act of Parliament for establishing the Roman Catholic religion and the French laws in that extensive country, now called Canada, is dangerous to an extreme degree to the Protestant religion and to the civil rights and liberties of America, and therefore, as men and Protestant Christians, we are indispensably to take all proper measures for our security."

These resolutions were prepared by General Joseph Warren, and were adopted at an indignation meeting held at Suffolk, Massachusetts, Sept. 9, 1774, and approved by the members of the first Continental Congress, then in session at Philadelphia, on the 17th day of the same month. This was the second starting point of the Revolution; and Warren, their author, fell in their defense at Bunker Hill, June 17, 1775.

It was the Quebec act which Richard Henry Lee, in the same Congress, pronounced the worst of all the bad acts of the British Parliament, an opinion in which he was sustained by every member of that body except the treacherous Galloway.

This is the act referred to in the Declaration of Independence, where the King and Parliament of Great Britain are denounced "for abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies."

This act had its inception in the Vatican, and is a shocking instance of the insidious methods and perpetual intermeddling of the Pontiff in the political affairs even of Protestant nations. It is a well established historical fact that Mgr. Guarandoti, who was secretary of the Propoganda under Pope Pius VII, wrote a letter to the British Cabinet Ministers in which he enlarged upon the advantages of "the Canadian Check," and in the most seductive terms explained what an excellent thing it would be to have a proper understanding between King George III and Pope Pius VII. In this letter he also declared that the Church would always in the future, as in the past, inculcate loyalty, obedience, and respect for sovereigns, and that her influence would be entirely against any revolutionary movements; calling attention especially to the fact that the spirit of independence in America at that time was confined exclusively to the Protestant colonies south of the St. Lawrence; that it was the Protestant colonies which resisted tyranny, while the Catholic colonies of Canada remained faithful to his majesty!

The Quebec act was designed to create two factions in British America, divided on religious, racial, and territorial lines, either of which might, when occasion arose, be used as an engine to keep the other in perpetual subjection to the central authority at London. It was not doubted that the animosities engendered by a long series of wars in the past could be kept alive as a convenient leverage for oppression by allowing Quebec to retain its Bourbon constitution.

The Protestant colonies flew to arms immediately upon hearing of its passage. To them it seemed the worst act of perfidy and high treason against God and the British constitution of which it was possible to be guilty. Before that they had disliked the King as a tyrant; now, they hated and despised him as a royal apostate, as a traitor, as a co-conspirator with their old enemies, the Jesuits, and

their Canadian Indian proselytes. And hence, in the Declaration of Independence we find the King charged with having "abdicated in this country," and with having "endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions."

The horror and dismay created by the Quebec Act may best be judged of by considering the state of religious feeling in New England in Colonial times. This is well illustrated in the will of Judge Paul Dudley, of Massachusetts, made in 1750. In his will Judge Dudley bequeathed to Harvard College a sum of money for a series of annual lectures on four specified subjects, "the third lecture," so the will runs, "to be for the detecting and convicting and exposing the idolatry of the Romish Church, their tyranny, usurpations, damnable heresies, fatal errors, abominable superstitions, and crying wickednesses in their high places; and, finally, that the Church of Rome is that mystical Babylon, that man of sin, that apostate Church spoken of in the New Testament."

It is not strange, then, that we find Hamilton, as well as Warren, attacking the Quebec Act. This attack is contained in his pamphlet entitled, "A Full Vindication of the Measures of the Congress of 1774;" (2 Hamilton, 1 to 36.) and was addressed to the farmers of New York, as the surest method of exciting them to resistance. "Being ruined by taxes is not the worst you have to fear," said he, "what security would you have for your lives? Would you put your religion in the power of any man living? Remember, civil and religious liberty always go *together. If the foundation of one be sapped the other will fall of course.*" (2 Hamilton's Works, 26.)

"The English laws have been superseded by the French laws. The Romish faith is made the established religion of

the land, and His Majesty is placed at the head of it. The free exercise of the Protestant faith depends upon the pleasure of the Governor and Council. The subject is divested of the right of trial by jury; an innocent man may be imprisoned his whole life without being able to obtain any trial at all. The Parliament was not contented with introducing arbitrary power and popery in Canada, with its former limits; but they have annexed to it the vast tracts of land that surround all these colonies.'

"Does not your blood run cold to think that an English Parliament should pass an act for the establishment of arbitrary power and popery in such an extensive country? *If they had had any regard for the freedom and happiness of mankind they would never have done it.* If they had been friends of *the Protestant cause*, they would never have provided such *a nursery for its great enemy*; they would not have given such great encouragement to *popery*. The thought of their conduct in this particular shocks me. It must shock you, too, my friends. Beware of trusting yourselves to men capable of such an action." (2 Hamilton's Works, 26-27.)

Article 32 of the Constitution of North Carolina adopted in 1776, provided that:

"No person who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments; or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.

Article 34 provided:

"That there shall be no establishment of any one religious Church or denomination in this State in preference to any other. Neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship

contrary to his own faith or judgement, nor be obliged to pay for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship; provided that nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses from legal trial and punishment."

Other articles are as follows:

1. That all political power is vested in and derived from the people only.

2. That all powers of suspending laws, or the execution of laws, by any authority without the consent of the representives of the people, are injurious to their rights, and ought not to be exercised.

Article 32 remained in force until 1835. (United States Constitutions, Colonial Charters, etc., vol. 2. p. 1413–16.)

Did the people of North Carolina intend to confer upon Congress the power to nullify these articles of their State Constitution? If not, Congress could not appropriate one penny contributed in taxes by a citizen of North Carolina for the direct or indirect support "of any one religious church or denomination whatever." Certainly not for the advancement of the monastic system. For in judging of this matter the rule laid down by Chief Justice Taney in the Dred Scott case (19 Howard 394) is to be our guide; and the more liberal sentiment lately developed towards the Catholic Church cannot be taken into the account. Chief Justice Tanney said:

"The change in public opinion and feeling in relation to the African race, which has taken place since the adoption of the Constitution cannot change its construction and meaning, and it must be construed and administered now

according to its meaning and intention when it was framed and adopted." There is no difference between a race and a religious system in respect to this principle. If it is true of one, it is true of the other.

As bearing upon the point at issue, we also refer the court to the memorial addressed by the Presbytery of Hanover, and the Quakers and Baptists of Virginia, to the legislature of that State in 1777, in opposition to a measure for establishing the Christian religion without reference to any particular denomination, by laying a general tax for the support of teachers of that religion; a measure analogous to the late measures of the Government in reference to donating grounds for sectarian chapels at West Point, and moneys to the sectarian schools for Indians. We also refer to Madison's Remonstrance, anno 1785, against "a bill for establishing a provision for teachers of the Christian rel'gion." Copies of these great documents will be found in the Religious Liberty Library, No. 8, April 1893, pp. 7-13.

In his Remonstrance Mr. Madison says: "It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise and had entangled itself in precedents. They saw all the consequences in the principle." And further on he says: "Distant as it (the bill aforesaid) may be in its present form from the Inquisition, yet it differs from that only in degree. The one is the first step, the other is the last, in the career of intolerence."

This prudent jealousy is no less emphatically enjoined upon statesmen by Machiavelli. "This" says he "is what every wise ruler ought to do; namely, not only to look at all present troubles, but also to those of the future, against which he should provide with the greatest prudence. It is

only by recognizing difficulties afar, that they can be surely provided against; for if we wait until they come near, the malady is likely to become incurable and the remedy to become ineffectual. It happens in such cases, as the doctors say of consumption, that in the early stages it is easy to cure but hard to recognize; whilst in the course of time, the disease not having been recognized and cured in the beginning, it becomes easy to distinguish but impossible to be cured. And so in public affairs, when evils are seen far ahead they are easily remedied; but, when having been overlooked, these evils are allowed to develop into such full luxuriance as to become manifest to everybody—even to the most thoughtless among men, it is then too late to think of any remedy." (Machiavelli, in The Prince.)

How essential this prudent jealousy is, in respect to the subtle and fatal encroachments of monastic influence and power, was fully appreciated by all the statesmen of the Revolutionary period. They were all as familiar with the works of Machiavelli, Pascal, Vattel, Montesquieu, and Blackstone, as we are with those of Gladstone, Fitzjames Stephen, Paul Bert, Froude, Emile Laveleye, Brooks Adams, Prof. Morse, Bleecker Miller, and Macaulay. Defining a "right" to be "a *well-founded* claim," they all denied the principle enunciated in Deuteronomy XVII, 12, 13; and hence they sought to avoid the consequences of that principle by erecting in their Constitution of Civil Government a wall of separation between Church and State. Would such men have conferred upon Congress the power to make permanent improvements upon the lands of a monastic order, upon the lands of the Sisters of Charity, of Emmetsburg, Maryland, if such a proposition had been brought before the First Congress? The answer to this question will settle the Constitutional principle involved in this case.

These principles and authorities would seem fully to justify the Supreme Court of the District of Columbia

in following President Madison's interpretation of the First Amendment. Mr. Justice Hagner, delivering the opinion of that court in this present case said:

"The Act of Congress referred to in the agreement is contained in a paragraph of the District of Columbia appropriation bill, Ch. 387, p. 679, passed at the second session of the 54th Congress, approved March 3, 1897, and is in these words: "For two isolating buildings, to be constructed, in the discretion of the Commissioners of the District of Columbia, on the grounds of two hospitals and to be operated as a part of such hospitals, thirty thousand dollars.

"The provision of the Constitution of the United States referred to in the bill, contained in the First Amendment to that instrument, introduced by Mr. Madison at the first session of Congress after the adoption of the Constitution, is in these words: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'

"The question for decision is whether, either the provision of the Act of Congress just quoted, or the agreement made by the Commissioners under the authority conferred by it, in words or in effect, is in contravention of the inhibitions of the First Amendment.

"It is scarcely supposable that Congress would ever pass a law in direct and palpable opposition to the prohibitions of the amendment. Probably the only instances where such violation would ever occur would be where some provision might be passed into the form of law without sufficient consideration and in the haste of legislation which, though unobjectionable on its face, would yet in effect, tend on the one hand, to foster or encourage religious societies or churches in general or any one in particular; or, on the other, to 'prohibit the free exercise of religion' on the part of any one or of all such societies or churches.

"No man more fully understood the importance of maintaining this priceless principle than Mr. Madison; or more thoroughly comprehended its just scope and the danger in which it stood from careless legislation.

"Early in his first term as President, Congress passed an act 'for incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia.' His religious affiliations were always with the Protestants, and his kinsman, Bishop Madison, who was elected the first Protestant Episcopal Bishop of Virginia, then held that office. The act, which seemed innocent enough on its face, provoked his first veto from the President; which is to be found in 1 Richardson's Presidents' Messages, page 496.

"The full text of the act appears in 22d Annals of Congress, p. 995. Its provisions are similar to the usual form of such acts, except that by section 8 it was provided the vestry might make such provision for the support of the poor of the parish as by them should be thought proper, and in like manner provide for the education of the poor children of the church. There was no way at that time, by which within the District of Columbia a vestry could be incorporated, except by Act of Congress; and but for the First Amendment, no possible objection could have been made to the act. But Mr. Madison discerned that the terms of the act were inconsistent with the inherent principles comprehended within the First Amendment; and that however harmless or beneficial the law might prove to be in practice, its passage would be an infringement of the principles of the First Amendment; and that it was his duty to prevent its admission among the laws of the country. His sedate and carefully considered language shows his sense of the high duty involved in the admonition, *obsta principiis.* He states his objections in these words:

'*Because* the bill exceeds the rightful authority to which governments are limited by the essential distinction

between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares that 'Congress shall make no law respecting a religious establishment.' The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and policy of the church incorporated, and comprehending even the election and removal of the minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law; a legal force and sanction being given to certain articles in its constitution and administration. Nor can it be considered that the articles thus established are to be taken as the descriptive criteria only of the corporate identity of the society, inasmuch as this identity must depend on other characteristics; as the regulations established are generally unessential, and alterable according to the principles and canons by which churches of that denomination govern themselves; and as the injunctions and prohibitions contained in the regulations would be enforced by the penal consequences applicable to a violation of them according to the local law.

'*Because* the bill vests in the said incorporated church *an authority to provide for the support of the poor and the education of poor children of the same;* an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies, as such, a legal agency in carrying into effect *a public and civil duty.*'

"A few days afterwards Mr. Madison returned with his objections another bill which had passed Congress, for the relief of five persons named therein and of the Baptist Church at Salem meeting house, in the Mississippi Territory. The first five sections cured certain formal defects

in the titles of parcels of land which had been paid for by the individuals named therein, and were unexceptionable in all respects. Section 6 provided, 'that there be reserved the quantity of five acres of land, including Salem meeting house, in the Mississippi Territory, for the use of the Baptist Church at said meeting house.' 22 Annals, 1103–4.

"The president said he returned the bill with the following objection: 'Because the bill, in reserving a certain parcel of land of the United States for the use of said Baptist Church, comprises a principle and precedent for the appropriation of funds of the United States, for the use and support of religious societies, contrary to the Article of the Constitution which declares that Congress shall make no law respecting a religious establishment.' 1 Richardson's Messages, 490.

"In each case the veto was sustained in Congress.

"It certainly seemed to be but a harmless act for the Government to grant to this impoverished church a few acres of wild land on the margin of a great wilderness; and probably this was the argument of those members of Congress who opposed the veto; either one of whom might probably have paid the full price of the land out of his pay for one day. But there would have been exhibited in making that insignificant gift the same contempt of the spirit of the First Amendment that would have been evinced if Congress had granted a dotation of half a million of acres, sufficient to endow a vast cathedral establishment or a great hospital under sectarian control. The difference would have been only one of degree.

"Examining the Act of Congress before me by the tests presented in the veto messages, I can see nothing in the language or natural scope or effect of the act itself, inconsistent with the principles of the First Amendment. It was perfectly known to Congress there are in the District

a considerable number of hospitals, some under sectarian control, but the majority of which are under nonsectarian management. There is nothing in the act intiminating that either of the hospitals to be selected by the Commissioners was to be under sectarian control; and especially in view of the subsequent section of the same appropriation bill, to be found on page 683, I must conclude that Congress could have had no such purpose.

"That section is in these words:

'It is hereby declared to be the policy of the Government of the United States, to make no appropriation of money or property, for the purpose of founding, maintaining, or aiding, by payment for services, expenses or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control; and it is hereby enacted that from and after the 30th day of June, 1898, no money appropriated for charitable purposes in the District of Columbia shall be paid to any church or religious denomination, or to any institution or society which is under sectarian or ecclesiastical control.'

"No one reading these two paragraphs of the act as though incorporated into one, could possibly conclude that Congress had directed or expected that the $30,000 appropriated should be expended within the grounds of any hospital under sectarian control, whether Lutheran, Methodist, or Roman Catholic. For when Congress, after making the appropriation, had made the foregoing declaration of the policy of the Government as to the *appropriations of money or property* to sectarian institutions, it would seem to have closed the discussion of the question.

"That the two paragraphs should be taken together, is in accordance with the settled rules for the construction of statutes. In Pennington *v.* Coxe, 2 Cranch, 53, Chief Justice Marshall said: 'That every part of an act is to be taken into view for the purpose of discovering the mind of the

legislature, is among those plain rules laid down by common sense for the exposition of statutes which have been universally acknowledged.'

"In Alexander *v.* City of Alexandria, 5 Cranch, 7, the Chief Justice declared: 'If in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases, previously used, that sense is to be adopted in construing those phrases.'

"In Rice *v.* Minnesota & N. W. R. Co., 1 Black, 358, the court said: 'It is not competent to reject or disregard a material part of an Act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together.' See also Bode *v.* State, 7 Gill, 326.

"If the paragraph making the appropriation had distinctly directed the isolating building to be constructed within the ground of Providence Hospital, it might have been considered as particular exception to the foregoing declaration of the general and paramount policy of the Government with respect to appropriations to institutions under sectarian control, and therefore not designed to be comprehended within its provisions. But the paragraph contains no such direction, and the principle applies that statutes must be interpreted, if possible, so as to make them consistent with the Constitution and the paramount law. Parsons *v.* Bedford, 3 Peters, 433; Presser *v.* Illinois, 116 U. S. 252.

"The duty entrusted by the Act of Congress to the Commissioners with respect to the construction of the isolating buildings came before them for execution as expressed and limited by the two paragraphs referred to. Whatever authority the Commissioners of the District of Columbia possessed with reference to the subject, they could only have acquired from Congress, which of course could communicate to them no powers it did not constitutionally

possess. Whatever acts were forbidden by the Constitution to Congress with respect to the assistance of religious establishments, were of course forbidden to its agents the Commissioners." (26 Wash. Law Rep. 85-86.)

Let the law and the facts be minutely examined and they will be found to support this opinion completely.

By analyzing the First Amendment, with reference to its grammatical structure, the meaning of the terms embraced in it, and the logical construction of them, we shall see more clearly the purpose of the whole. It is a compound sentence composed of six simple sentences contracted.

1. Congress shall make no law respecting an establishment of religion.

2. Congress shall make no law prohibiting the free exercise of religion.

3. Congress shall make no law abridging the freedom of speech.

4. Congress shall make no law abridging the freedom of the press.

5. Congress shall make no law abridging the right of the people peacably to assemble.

6. Congress shall make no law abridging the right of the people peacably to petition for redress of grievances.

Every one of these sentences except the first refers to a mere right unconnected with property. The predicates of all but the first may be made the subjects of sentences in the passive construction; as, the free exercise of religion shall not be prohibited by any law to be made by Congress; the freedom of speech shall not be abridged, etc.; the freedom of the press shall not be abridged, etc., and so of the others. But such is not the case with the first sentence. To say, "an establishment of religion shall not be respected by any law to be made by Congress," would not convey the meaning of the original. "Respecting," then, is not a

participle in this instance like, prohibiting and abridging. Concerning these, there is no ambiguity; but respecting calls for judicial interpretation.

In Webster's Dictionary it is defined thus: "RESPECTING, prep.—With regard or relation to; regarding; concerning." Law making by Congress is, then, forbidden, with regard or relation to an establishment of religion.

ESTABLISHMENT.—This word Webster defines to be:

"1. The act of establishing, ratifying or ordaining; settlement; confirmation.

"2. The state of being established, founded, and the like; fixed state.

"3. That which is established; as: (*a*) A form of government, civil or ecclesiastical; especially a system of religion maintained by the civil power; (*b*) A permanent civil, military, or commercial force of organization; (*c*) The *place* in which one is permanently fixed for residence or business; that which serves for the carrying on of a business."

OF.—Two of the twelve definitions of this word given by Webster are as follows:

"6. Denoting reference to the thing; about; concerning; relating to."

"10. Denoting relation to place or time; belonging to; connected with."

"Of, may be used in the subjective or objective sense. 'The love of God' may mean our love for God, or God's love for us."

RELIGION.—Webster gives four definitions of this word, the third of which is as follows:

"3. (R. C. Ch.). A monastic or religious order, subject to a regulated mode of life; the religious state; as to enter religion."

AN.—This word also calls for construction. In every universal negative proposition it is distributive, and means, "any." But 'any,' implies more than one, just as 'every',

in a universal affirmative does. It places all the particulars it modifies in the same category. No law shall be made, therefore, respecting one single establishment of religion, or any number of such establishments. Religion shall not be established by Congress in one single corporation or in many. If it can be established in many, why not in one—many includes one; and one would cost less for its support than many.

"An establishment" denotes, in one sense at least, a *fait accompli*; "the establishing" donates a process. It is not merely the latter but the former also with reference to which all law-making is forbidden; and let it be remembered that law-making is the only thing forbidden. An establishment of religion already existing in any State, or which might afterwards be created by any State, was not intended to be affected by this provision. The States might retain, reject, establish, or disestablish religious institutions; but Congress was interdicted from intermeddling alike with such institutions and with their doctrines, discipline or exercises.

Chief Justice Waite, in the case of Reynolds *v.* United States, 98 U. S. 145, 162, 164, quotes from a letter of Mr. Jefferson, as follows:

"Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only and not opinions—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his *natural rights*, convinced *he has no natural right in opposition to his social duties*." The Chief

Justice then adds: "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authorative declaration of the scope and effect of the Amendment thus secured."

The kernel of the whole scheme is that Almighty God has created the mind free. In order to see the importance of it, it must be contrasted with the monastic theory which is the kernel of the greatest religious establishment in the world, a theory whose pecularities are soul-slavery, mind-slavery, body-slavery, absolute poverty and perpetual barrenness. This was distinctly recognized and stated by Prof. Morse. "From their principles of passive obedience, and the denial of the right of private judgment alone," said he, "Roman Catholics, as a sect, must be the ignorant and willing slaves of any despotic ecclesiastic who may, for the time being, rule over them." But these principles are mere derivatives from that higher one which recognizes "a superior who represents God"—a mortal divinity, an Infallible Pope. Upon this rests the whole scheme of the monastic system, as laid down in the so-called Evangelical Counsels. Let me submit an outline of that wonderful scheme. I take it from DeHarbe's Full Catechism of the Catholic Religion, pages 233–4:

"Q. What particular means of attaining perfection have been recommended by Jesus Christ?

"A. Chiefly those which are called the Evangelical Counsels.

"Q. What are the Evangelical Counsels?

"A. Voluntary poverty; 2, perpetual chastity; 3, entire obedience to the will of a spiritual superior.

"Q. What is entire obedience?

"A. It is a renunciation of one's own will, in order to do the devine will more surely under a superior who represents God.

"Q. Why are the Evangelical Counsels special means of perfection?

"A. 1. Because by them the chief obstacles to Christian perfection are removed, namely, the inordinate love and desire of earthly goods, sensual pleasures and the pride of independence; and 2. Because of them man sacrifices to the Lord his God all that he has and is; his *exterior goods*, by the vow of poverty; his *body* by the vow of chastity; and his *mind*, or will by the vow of obedience."

Q. "Who are obliged to observe the Evangelical Counsels." A. "All religious, and all those who have bound themselves by vows to keep them."

Now, the taking and keeping of these vows result in what is called supererogation. Concerning this I quote from Buck's Dictionary, page 572:

"SUPEREROGATION—is what a man does beyond his duty, or more than he is commanded to do. The Romanists stand up strenuously for the works of supererogation, and maintain that the observance of evangelical counsels is such. By means of which a stock of merit is laid up, which the church has the disposal of, and which she distributes in indulgences to such as need.

"This absurd doctrine was first invented toward the close of the twelfth century, and modified and embellished by St. Thomas in the thirteenth, according to which, it was pretended that there actually existed an immense treasure of merit, composed of the pious deeds and virtuous actions which the saints had performed beyond what was necessary for their own salvation, and which were, therefore, applicable to the benefit of others; That the guardian and dispenser of this precious treasure was the Roman pontiff; and, that, of consequence, he was empowered to assign to such as he thought proper, a portion of this inexhaustible merit, suitable to their respective guilt, and sufficient to deliver them from the punishment due to their crimes." See also De Harbe's Catechism, 291 and 326.

The statements of DeHarbe and Buck being taken as true, let us connect them with the fact that Protestant Americans

pay taxes into the Federal Treasury, a part of which are paid out on contracts or subsidies to monastic orders.

If our taxes are used in part to aid monastic orders; and if monastic orders are founded in principle upon the Evangelical Counsels; and if the observance of these constitutes supererogation; and if supererogation is a precious treasure placed at the Pontiff's disposal; and if the Pontiff and his agents dispense this treasure to sinners and criminals for money or any other advantage, in such a way as to exempt the guilty from the penalties or penances due to their crimes; and, finally, if such licenses for exemption from the consequences of guilt encourage crime; then, it follows, that our taxes are used in part for the enrichment of the Pope and his agents, and for the encouragement of crime.

Again, it is to be admitted by every one, that evangelical counsels, supererogation, and the granting of indulgences, are characteristics of a religious system pure and simple, and not of a civil system ; and therefore, indeed, if religious persons engaged in the operations of that religious system, subject to the supervision of a superior who represents God, draw their necessaries of life from the public fund raised by taxation for civil purposes only, and thereby become entangled with the political system in the vital matter of subsistence, the civil authority thus becomes a party to the operations of a religion, and responsible for the effects thereof. Whether the coalition be made under the subterfuge of a contract or not, the effect upon the tax-payer is the same; the effect upon the subsidized religion is the same, and the effect upon civilization is the same. This spurious contract system is what Mr. Gladstone would have called Rome's newest fashion in religion. It is a pious fraud. It breaks down the "wall of separation between Church and State"; it destroys "the essential distinction between the civil and religious functions"; it compels the tax-payer "to make contributions of money for the propagation of opinions which he disbelieves;" and, moreover,

it subverts and nullifies not only our written constitution but also that great ancillary policy connected with it, known as the Monroe Doctrine, which was intended to prevent the re-establishment of Spanish and Roman civilization in our neighborhood, as inimical to republican institutions and the natural rights of man. It has been the means of insinuating the poison of that civilization into the very heart of this nation. It is itself an element of that civilization, and has found its vindication only in a train of reasoning not often heard in courts of justice.

Let us now look to some hypothetical cases. It is provided in the Constitution that *no person*, except a natural born citizen, etc., shall be eligible to the office of President. Would an act of Congress be constitutional if it should declare Aguinaldo or some other popular foreigner to be eligible to that office?

Congress was forbidden to prohibit the migration or importation of such persons as any of the existing States should think proper to admit, prior to the year 1808. Would the Act of 1815 which prohibited the slave trade have been constitutional if it had been passed prior to 1808?

"The privilege of the writ of habeus corpus shall not be suspended, unless when, in case of rebellion or invasion the public safety may require it." Would an act of Congress suspending the writ of habeus corpus in time of peace be constitutional?

"No bill of attainder or ex post facto law shall be passed." Suppose Congress should pass a bill of attainder against me, would it be constitutional? Suppose it should pass an ex post facto law, would not this court declare it to be void? (Serg. Const. Law, 357).

"No capitation or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken." This court has decided that an act of Congress violating this prohibition was void.

"No tax or duty shall be laid on articles exported from any State."

The prohibition here is exactly coextensive with that of the First Amendment. It is universal. Would an act of Congress laying any duty whatever on exports from any one of the States be constitutional?

"No money shall be drawn from the Treasury but in consequence of appropriations made by law."

Would this court hold that a statute authorizing money to be drawn from the Treasury to build a Roman Catholic Church at West Point or a Cathedral at Washington, would justify the Treasurer in paying out the public money in view of this provision? Would such a statute be constitutional?

"No title of nobility shall be granted by the United States." Would an act of Congress granting one or more titles of nobility be constitutional?

"No religious test shall be required as a qualification for any office under the United States." Would a religious test for any one office be constitutional? Would an act of Congress requiring the President to be a Baptist be so?

Finally, suppose that Congress should enact a statute authorizing any State to pass bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, what would be the effect of such forbidden legislation?

Concerning constitutional limitations and the philosophy underlying them, see opinions in Fletcher *v.* Peck, 6 Cranch, 124, 136-7-8.

Marbury *v.* Madison, 1 Cranch, 138.
Bank of Hamilton *v.* Dudley's Lessees, 2 Peters, 492.
City of New York *v.* Miln, 11 Peters, 102.
Gibbons *v.* Ogden, 9 Wheaton, 1.
Brown *v.* Maryland, 12 Wheaton, 219.
Briscoe *v.* Bank of Kentucky, 11 Peters, 257.
Charles River Bridge *v.* Warren Bridge, 11 Peters, 420.

Reynolds v. U.S. 98 U.S. 162-4

Prigg *v.* Pennsylvania, 16 Peters, 539.
Passenger Cases, 1 Howard, 283.
Income Tax Cases, 158 U. S., 601.
Ex parte, John Merryman, Tyler's Memoir of Taney, 646.

In Marbury *v.* Madison, Chief Justice Marshall, disposing of the question whether the Constitution of the United States is to be regarded as an absolute limit to the legislative powers, or is as in England, at the mercy of the legislature, used this language:

"The powers of the Legislature are defined and limited. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a Government of limited and unlimited powers is abolished, if these limits do not confine the persons on whom they are imposed. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution *is not law:* if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and permanent law of the nation; and, consequently, the theory of every such Government must be, that an act of the Legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society."

In Phillips *v.* Quick, 63 Ill., 445, the court said:

"It may be said that constitutional provisions require legislation to carry them into effect. This may be true in many cases, but not in all; as will occur to every person on a moment's reflection. In cases where its provisions are negative or prohibitory in their character, they execute themselves. When this instrument limits the power of either of the departments of the Government, or where it prohibits the performance of an act by an officer or person, no one would contend that the power might be exercised or the act performed until prohibited by the General Assembly. The Constitution undoubtedly has as much vigor in prohibiting the exercise of power or the performance of an act as the General Assembly has. That body could add to the prohibition penalties and forfeitures for disregarding the Constitutional prohibition, but the prohibited act would nevertheless be void.

"When the Constitution requires the performance of an act, but provides neither officers nor the means or mode in which the act shall be performed, in such a case there is no other means of carrying such a provision into effect but by appropriate legislation. In such cases the Constitution does not execute such provisions. That instrument, all will concede, may repeal, and does repeal, laws which are repugnent to its provisions."

And in Cook County *v.* Industrial School for Girls, 125 Ill., 540, the Court said: "If on the one side a statute directs the County board to pay money to a school, which appears not on the face of the statute, but from outside proof, to be controlled by a church; and if on the other side, the Constitution, in a self-executing prohibition directs the County board not to pay money to such a

school; *which direction is to be followed?* We answer unhesitatingly *the latter.* When the constitution says "you must not pay" it must be obeyed in preference to a statute which says "you must pay." And this is true not only where the statute, on its face, is in conflict with the constitutional provision, but also in a case *where an attempt to apply the statute to a given state of facts gives rise to* a violation of such a provision."

One violation of a constitutional prohibition is no excuse for another, and no constitutional rights are barred by estoppel or prescription. In Washingtonian Home *v.* Chicago, 157 Ill. 414, it was insisted in the argument that since the city had paid over the fund in dispute quarterly for a period of over twenty years, the payment having been recognized each year in the annual appropriation ordinances of the city; and that since the city had received substantial benifit each year, it was bound by its ratification of the act, and was therefore *estopped from denying its constitutionality.* But the court said (p. 428): "The fact that the officers of the city for twenty-two years, paid over to the Home, annually, a portion of the revenue of the city in violation of law, could not work an estoppel on the city. Nor did the fact that the City Council annually, in its appropriation ordinances, recognized and made provisions for the payment of the fund to the Home estop the city from refusing to make payment at any time it might elect to do so. The revenues of the city of Chicago, arising from licenses, from taxation and from all other sources, are owned by the the city, and held by it in trust to be used for corporation purposes which are lawful; and the revenues of the city can not be diverted to any other purpose."

"The revenues of the city can not be diverted by the officers of the city, or by the City Council, to any person they may think entitled to the same; but, on the other hand, such revenues *can only be paid out*, or appropriated, by the City Council or *its officers* in a manner and for purposes

authorized by law. Where the lawful power does not exist, the payment is unauthorized and void; and the city will lose no rights where the money has been unlawfully paid out by its officers. The city having no power to pay over its revenues to the Home, the fact of payment for a series of years will not estop it."

On the question of estoppel see also, 7 Am. and Eng. Encyc. of Law, 17, 18; Bigelow on Estoppel, 2d ed., 345; Logan County *v.* City of Lincoln, 81 Ill., 156.

Judge Cooley says, (Const. Lim. 5th ed., 580.): "Those things which are not lawful under any of the American Constitutions may be stated thus * * * 2. *Compulsory support, by taxation or otherwise, of religious institutions.* Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary."

Arguing from these fundamental principles Mr. Justice Magruder, in the Cook County case, disposed of several questions that have been raised in this case. Said he: "It is not contended by the county that the organization of appellee is defective; on the contrary it seems upon the face of the papers, to have been organized in strict conformity to the statutory requirments. The Constitution forbids the county to pay—the defense is grounded more upon the constitutional prohibition as controlling the action of the defendant (the county) than upon such want of power, or abuse of power, as affects the plaintiff in the suit (125 Ill., p. 564)

"Suppose that a corporation, organized for a lawful purpose, maintains and operates a gambling institution and brings suit upon a note payable to its own order, and given to it for a lawful debt. The maker of the note can not defend on the ground that the plaintiff is perverting its power by running a gambling establishment. That matter must be inquired into by a writ of *quo warranto* or *scire facias*. But if the note in question *had been given for a gambling debt*,

that fact could be set up as a defense, because the statute makes such a note absolutely void (Id. pp. 564-5.)

"If the contract sued upon is a contract by the county *to pay money out of the public funds in aid of a sectarian purpose*, it is absolutely void; for the constitutional prohibition against *paying* money is equally a prohibition against a *contract* to pay money. Can it be doubted that the void character of such a contract can be set up as a defense? (Id. p. 565.)

"It is strenuously contended by counsel that section 3 was intended only to affect gifts or donations, and that it refers to State support, gifts by way of aid, and appropriations to be used by managers of religious institutions without restraint or liability to account. The theory seems to be that, even if the two institutions are controlled by a church, and are to be the recipients of all the money paid to appellee, yet neither they nor their purposes are aided by such payments, provided only that there is a consideration for the money so paid. It is said that these institutions furnish tuition and clothing in return for the money received by them, and that since they earn what they get and are not the recipients of any gifts or donations, nothing is paid in their aid or to help support or sustain them. * * * *

"The doctrine here contended for is an exceedingly dangerous one. In the County of McLean *v.* Humphreys, 104 Ill., 378, it is intimated by this court that the State is under obligations to protect and educate such classes of female infants as were declared to be dependent girls. * * * * Under this view the industrial schools which teach and care for such girls are performing as substitutes for the State, a duty which the State is bound to perform. If they are entitled to be paid out of public funds even though they are under sectarian denominations, simply because they relieve the State of a burden which it would otherwise be itself required to bear, then there is nothing to prevent *all public education* from becoming subjected, by hasty and unwise legislation, to sectarian influences. It being the duty of the State to

provide an efficient system of free schools, if statutes are passed, under which the management of these schools shall get into the hands of sectarian institutions then under the theory contended for, the prohibition of the constitution will be powerless to prevent the money of the taxpayers from being used to support such institutions, as they will render a service to the State by performing for it its duty of educating the children of the people. It is an untenable position that public funds may be paid out to help support sectarian schools, provided, only, such schools shall render a *quid pro quo* for the payments made to them." (Id. p. 571.)

This is in accord with the soundest philosophy. "It is in the matter of education" says Plato, "that our guardians should erect their guard-house; for here it is that superstition creeps in unawares in the guise of amusement or religion, professing to do no mischief. And, indeed, it does none, except that, gradually gaining a lodgment, it quietly insinuates itself into manners and customs, from which it goes forward in greater force and makes its way into mutual compacts. And from compacts it goes on to attack laws and constitutions, displaying the utmost impudence, until it ends by overthrowing everything, both in public and in private."

Again, in the case of Farmer *v.* St. Paul, 67 N. W. Rep., 990, Chief Justice Start, reasoning upon the same general principles, condemned a contract with the House of the Good Shepherd, in the form of an ordinance of the City Council of St. Paul.

"Clearly," said he, "this ordinance is in excess of the authority conferred upon the city, and it is void for that reason. As a legal proposition (the question of propriety of so doing aside) the city council had as much power to establish and declare any church in the city a work-house for female prisoners, and to authorize the city courts to commit any female convict to the custody of the rector or

pastor of said church, and require and authorize him to keep such prisoners at hard labor not exceeding thirty days, and to make monthly reports to the City Council, as it had to declare the House of the Good Shepherd, or any other institution not subject to public control, such a work-house. The only work-house the city was authorized to establish was a public work-house, which should be governed and controlled by municipal authority. This ordinance does not establish such a work-house. It is void, and all commitments of female prisoners to the House of the Good Shepherd by the city courts are void.

"It necessarily follows that any contracts on the part of the city, express or implied, for the future detention and support of prisoners in an institution to which such prisoners cannot be legally committed, are illegal."

Another case involving these principles is that of State *ex rel* Nevada Orphan Asylum *v.* Hallock, State Controller, 16 Nevada, 373.

It was an application for a mandamus to compel the State Controller to audit an account for $1,279, and to issue his warrant on the State Treasurer for the same in favor of the petitioner, the Nevada Orphan Asylum, said amount having been apportioned and allowed to the petitioner by a majority of the board of asylum commissioners for the support and maintenance of orphans and half orphans, under the statute of the State. The Controller, Hallock, refused to audit the account, or to draw the warrant on the ground that the Nevada Orphan Asylum, which was *a branch of the Mother House of the Sisters of Charity of Emmetsburg, Maryland*, was a sectarian institution; and that he was forbidden to comply with petitioner's request by section 10 of article XI of the State Constitution, which reads as follows:

"Section X. No public funds of any kind or character whatever, State, county or municipal, shall be used for sectarian purposes."

Leonard, Chief Justice, delivering the opinion of the Court said:

"The respondent admits that the claim of the petitioner is valid in every respect, except as above stated; and it is not claimed that the statute referred to is unconstitutional. In short the respondent concedes it to be his duty to audit the account and draw his warrant therefor, if by so doing he would not use the State's money for sectarian purposes; but, on the contrary, he conceives it to be his duty to refuse compliance with the petitioner's demands if, in fact, the Nevada Orphan Asylum is a sectarian institution, notwithstanding the statute.

"That the legislature, under the Constitution, could not have appropriated moneys for sectarian purposes is too plain for argument; and it is equally plain that State funds should not and cannot be used for such purposes in any case as the statute is written, any more than they could have been so used if the statute had contained a proviso excepting asylums or institutions of a sectarian character.

"No officer is justified in obeying the letter of the law, if in so doing he violates the spirit and letter of the Constitution.

"Counsel for petitioner say that petitioner has performed its part of a contract, and the State should now be required to perform the contract on its part. The Constitution, as amended, was in force when the statute was passed, and petitioner is presumed to have had knowledge of its provisions. It knew also that it could not receive the benefits and privileges of the statute, if such action would violate the Constitution. In fact, if payment of petitioner's claim would be using the State's moneys for sectarian purposes, it has had no right to suppose that the statute was intended for its benefit. (Id. p. 379.)

"Constitutions, as well as statutes, are to be construed in the light of previous history and surrounding circumstances. (Id. p. 379.)

"It is admitted by counsel for petitioner that the St. Mary's School is a part or branch of the Nevada Orphan Asylum; that it is controlled exclusively by officers of the latter, who are Sisters of Charity, members of the Roman Catholic Church, and who cannot become sisters unless they are members of that Church. The petitioner is a branch of the "Mother House" at Emmetsburg, Maryland, and has to report to it. (Id. pp. 383–4.)

"Counsel for the petitioner lay great stress upon what are claimed to be the facts; that is to say, that Protestant children are taught only those things which are common to all Christian people; and that only the children of Catholic parents are taught the principles of the Catholic Church. In the first place the facts are not so; and in the second place, if they were, the instruction given to the Catholic children would stamp the institution as sectarian. The Constitution prohibits the use of any of the public funds for any such purposes, whether parents wish it or not. If all the children at the asylum were Catholics, and all their parents or friends wished them to be taught Catholic dogmas, these facts would not make the institution nonsectarian. It is what is taught, not who are instructed, that must determine this question."

The argument relied on by the Court of Appeals for ordering the bill in the present case to be dismissed, is that because Congress *has incorporated* religious institutions, it has the power to do so; and since it has that power, it has the right to make contracts with such institutions when incorporated. This involves not only the fallacy of asserting the consequent and inferring the antecedent, but also the absurdity of deriving an incidental power to legislate respecting religious institutions from an absolute prohibition of any and all legislation on that subject—of deriving something from nothing. It is a phase of teleology more in keeping with poetical or clerical than with judicial methods. So far as I know, the argument from design has no place

among the canons of constitutional construction. But let it be assumed for convenience that Congress had the power claimed for it in respect to the creation of such corporations.

A corporation is a mere creature of the law, deriving all its powers from the act incorporating it, and can exercise the same only in the manner therein authorized. (Bank of Augusta *v.* Earle, 13 Peters 519.)

In reference to this principle it is worthy of remark here that the Commissioners agree to pay a designated rate for the patients they may send to the ward for minor contagious diseases, *subject to annual appropriations made by Congress;* while Section 81 of the Revised Statutes of the District (which, by the Act of 1879, is applicable to the Commissioners) declares the Commissioners 'shall have no power to make contracts to bind the District except in pursuance of appropriations made by law, and *not until such appropriations shall have been made.*"

And again, while the act of April 8, 1864, authorizes "The Directors of Providence Hospital," *by that name*, to "care for such sick and invalid persons as may *place themselves* under the treatment and care of the said corporation" (13 Statues 43); yet "Sister Beatrice, President of Providence Hospital," stipulates "that two-thirds of the entire capacity of said isolating building or ward shall be reserved for the use of such poor patients as shall be *sent there by the Commissioners through the proper officers.*" (26 Washington Law Reporter, 243) Certainly in these matters both parties to the compact have exceeded the limits of their authority.

Again, "said Providence Hospital agrees to always maintain a *neutral zone* of forty feet around said isolating building or ward' *and grounds connected therewith* to which patients of said ward may have access." Now, what is a neutral zone? and how much territory might it be made to inclose in the neighborhood of Providence Hospital? This is an extremely suspicious provision. It implies the assent of the Commissioners to the assumption by Sister Beatrice of

the power to maintain a neutral zone around a territory indefinitely bounded. Could the officers of the law serve a writ of habeas corpus within that territory? Could they cross that neutral zone? Would not Providence Hospital become a "city of refuge" if this neutral zone were established? The term must be taken in its technical sense.

This compact is on its face a mere conspiracy. The agreement to receive prisoners without due process of law, (judicial process) and in violation of that part of the charter which secures personal liberty to the inmates of the hospital, is one part of the consideration. The neutral zone arrangement by which these prisoners might be held indefinitely, and by which fugitives might be protected, is the other part of it. The whole consideration is, therefore, null and void, as contrary to law. (See Ex. Parte John Merryman, Tyler's Memoirs of Taney, 646.) Yet this is the *quid quo pro* which the taxpayers of the United States are to receive, according to the terms of the compact, for money wrung from them for the benefit of a monastic order located in Emmetsburg, Maryland, and controlled in all its branches by the Pope of Rome!

The title to property rests upon the power creating such title, which in this case is the power of taxation vested in Congress by the Constitution, and it must depend for its validity upon the terms, conditions, and limitations of that power. The Constitution is a system of parts and their relations determining the character and effect of the whole. One who supports it in good faith must observe its prohibitions as well as its positive commands. He must not do what it forbids.—If he does, his act is void for want of authority. *The Constitution binds and limits both Congress and the Treasurer in reference to the disposition of public money or property, as well as in reference to the laying and collection of taxes.*

In his work on the Conflict of Laws, sections 363 *et seq.*, Judge Story notes and dwells upon the important distinc-

tion between local and personal statutes and contracts; and in the case of Wills *v.* Cowper, 2 Hamm. 124, the same question was ably discussed by Mr. Justice Sherman. Now, if that distinction is to be observed here, the contract between the Commissioners and Providence Hospital is either local or personal. If it is local, it is prohibited by the Constitution, because the land on which the building is to be erected at the expense of the United States is the property of a religious establishment, a monastic order, having its habitat in Maryland, and Providence Hospital, as to its members, is subject to, and not superior to, that order. If it is a personal contract, it is void because the premises on which the house is to be built are not properly described and identified; since Providence Hospital does not own any land at all; and cannot, as at present constituted, own any property; its membership being nuns under the vows of poverty and obedeince, who cannot in the eye of the law be competent to execute personal trusts and confidences.

The reasons for this incapacity to become civil and public agents was clearly stated by Prince Bismarck in his speech defending his order of June 15, 1872, forbidding certain nuns from teaching in the public primary schools of Germany, on account of their ecclesiastical relations.

"These teachers," he said, "are bound to their order by the most sacred vows. Before they become teachers or servants of the state, they are vowed to passive obedience to superiors who are often not within the jurisdiction of the state; and their views, the conditions of their position, do not permit them to understand the nature of the state in which they live. Alien authorities assume to decide how far these teachers shall obey the laws, while that alien authority itself has not the independence which it formerly enjoyed. Moreover, secular remonstrance is of little weight with those who are so bound by religious vows. How entirely their individuality is lost is shown in Rhenish Prussia, in Westphalia, in Silesia, where the contracts for this service are not concluded

with a person, but with a superior or a congregation. Even their salaries are paid to the superior or to the congregation."

A personal trust or confidence, therefore, in this case must prove abortive, and cannot be maintained upon legal principles; the powers of the corporation known as Providence Hospital being delegated civil powers, while the persons composing that corporation are subject to the jurisdiction of an alien ecclesiastical body, of which they are also members. The religious as well as the civil side of the institution must be considered; for it has a double nature and a double purpose.

An act of incorporation is the establishment of a body corporate and politic; and a body politic which is composed of religious persons, separated by vows from the rest of the community, and which draws its support, wholly or in part, from the public treasury, is a religious establishment, and therefore falls within the letter and spirit of the constitutional inhibition.

The 'Sisters of Charity' is an order of nuns established by the Pope of Rome. It matters not that it has also been incorporated under the laws of Maryland, it is still, as to this District, a foreign corporation. By the comity of nations it is permitted to hold property here. It may also dispose of all or any part of its property. Now suppose that its Superior at Emmetsburg should transfer her subordinates, Sister Beatrice included, to some other locality, and sell Providence Hospital, or give it to the Archbishop of Baltimore; could the Government recover the money which it has advanced already, or that which it now proposes to advance, for erecting buildings on the real estate belonging to the Sisters of Charity? This is the *quid pro quo*, so loudly talked of by some and so inconsiderately by others. Is it not elusive? Any payment made on credit to Providence Hospital, or for its benefit, is a credit given really to the Sisters of Charity of Emmetsburg, Maryland.

The Directors of Providence Hospital own nothing, Sister Beatrice owns nothing. The Mother House of their order is the real beneficiary of Congressional bounty in this case. It owns the property, it controls the Sisters; but it was not incorporated by an act of Congress; it is not a citizen of this District; it can not be controlled by the Federal Government.

The attention of the Court is respectfully called to the following extract from part 2 of the report of the Joint Select Committee to investigate the Charities and Reformatory Institutions of the District of Columbia, (H. R. Report No. 776, 55th Congress, 2d session, pp. 12–13.):

"*The Providence Hospital* is owned by the Sisters of Charity of Emmetsburg, Md., and is conducted by them. The institution is not primarily a charitable institution. Persons seeking hospital care are admitted at a charge for board and lodging, varing according to the accommodations furnished, and in addition they pay for medical attendance such as may be agreed upon between the physicians and the patients. Any physician in good standing may send a patient to the hospital and there treat him. The hospital also receives an income from medical students who attend clinics.

"The United States has a contract with the hospital, by which the institution agrees to care for an average of 95 patients sent by the Surgeon-General of the Army, and for this service it receives the sum of $19,000 annually, making the average daily cost to the Government 54.9 cents per day per patient. . . . . .

"Theoretically, all patients are admitted on the order of the Surgeon-General; practically, cases are admitted by the Sister in charge, who simply makes a report to the Surgeon-General. There appears to be no adequate examination into the question as to whether the persons need treatment

or whether they are able to pay for treatment. The Surgeon-General exercises no real supervision over the admissions, and the sanitary officer, without investigation, simply exercises his judgement as to sending to the hospital persons making application at his office for free treatment. Therefore, while theoretically there is a contract with the hospital providing for a certain number of patients, and while the hospital undoubtedly receives and cares for a number of patients at least equal to the number required, no measures are taken to protect the Government against imposition on the part of persons who seek free treatment when they are able to pay for hospital services. The annual contract, therefore, is little more than a survival of the proper system as applied to hospital admissions.

"As has been said, the hospital is owned and operated by the Sisters of Charity. *A chapel is maintained in the hospital building, and there is a resident chaplain.* It is probable that the patients seeking Providence Hospital do so with a full knowledge of the facts in the case so far as *the religious connections of the hospital* are concerned; and the reputation of the Sisters of Charity for devotion in hospital work doubtless draws many patients thither.

"From the reports it would appear that all receipts of the hospital are used to *enlarge* and increase the efficiency of the institution. The amount paid per patient per day by the District is not excessive, but on the other hand it undoubtedly fully covers the actual cost of the services rendered; and especially is this the case in view of the fact that the Government has appropriated $60,000 to pay in part for the buildings."

Ever since King Ethelwulph granted the tithe of his kingdom to "the religious" in the year 850, there has been an irrepressible conflict in the schools, in the Parliament, in the courts and on the battlefields of England, respecting religious establishments. Out of this conflict grew the numerous

statutes of mortmain, beginning with the 36th Article of Magna Charta, and ending with the 9th George II, ch. 36, which was in force at the time our Constitution was adopted. A collection of these statutes will be found in Shelford on the Law of Mortmain. I cannot here give extracts from them or from the decisions of the courts expounding them, but must content myself with referring to such works as Highmore on Mortmain, Duke on Charitable Uses, Ambler's Reports, Wilmot's Opinions, 2 Burns' Ecclesiastical Law, and Mr. Wheaton's note to the case of Baptist Association *v.* Hart's Executors, 4 Wheaton, Appendix, p. 3.

My contention is that the power to grant licenses in mortmain was not delegated to Congress, but was denied to it by the first clause of the First Amendment, for the same reasons that impelled the English nation to deny to "religious houses" and "the religious" in general, the right to hold lands without a license from the crown; to wit, the common defense and general welfare, as expressed in the statute De Religiosis, and in 9th Geo. II.

Highmore says that: "The great power that the Pope had acquired in England arose from the numerous monasteries which had been erected in all parts of the island and which not only increased daily in wealth but were with all their territories at his devotion. That it was demonstrated to the King (Edward I.) that the church, never dying, always acquiring, and never alienating—her riches must consequently increase, so that, in process of time, all lands would be in possession of the clergy. * * * * * The King, therefore, proposed, and his parliament adopted, the statute De Religiosis." (Anno 1279. 7 Ed. I.)

That celebrated statute recites: "That it had been of late provided that '*religious*' should not enter into the fees of any (themselves or others) without the license and will of the chief lord of whom such fees were held immediately; but that notwithstanding such provision, such '*religious*'

had entered, as well into their own fees as unto the fees of other men, appropriating and buying them, and sometimes receiving them as gifts of others; whereby the services that were due on account of such fees, and which at the beginning were provided for the defense of the realm, were wrongfully withdrawn." It then enacts, "That no person natural or corporate) religious or other, shall buy or sell, by color of gift, lease or otherwise, or receive by reason of any other title, any lands or tenements, whereby the said lands may come into mortmain."

It appears that Edward I. was the first Christian prince who passed a statute of mortmain and prevented by law the clergy from making new acquisitions of lands, which, by the ecclesiastical canons they were forever prohibited from alienating. The King's object in passing it was chiefly to preserve the military force of the Kingdom. (Highmore on Mortmain, pp. 15, 16, 17.)

By the 9 Geo. II. C. 36. s. I, it is recited: "That gifts or alienations of lands, tenements or heritaments in mortmain are prohibited or restrained by Magna Charta and diverse other *wholesome laws as prejudicial* to and against the common utility."

In Attorney-General *v.* Meyricke (2 Vesey, 44.) one question decided by the court was: whether the mortmain act (9 Geo. II, Ch. 36) prohibited a devise of money to a charity, to be laid out in land. "This" said Lord Hardwicke, "depends on the reason of the law and the construction of its several clauses. The court ought to put such a construction on this act, being a remedial law, as will most effectually repel the mischief and advance the remedy. And, therefore, if by any means the mischief intended to be prevented by the act may happen, the act ought to be construed to prevent it." * * * * * * The intent was to prevent lands coming by any means into hands where they would be unalienable. Therefore the first prohibition is absolute

as to real estate, but leaving men at liberty as to personal. The next circumscribes personal estate and says: 'you shall not give money to be laid out in land' * * * which clause ought to have a liberal construction, to prevent the mischief." See also Highmore on Mortmain, 152-3; Attorney-General *v.* Groves, Amb. 155.

The capacity of private individuals or of corporations to hold lands in this country was not affected by the Revolution. (Society, etc *v.* New Haven, 8 Wheaton 464.)

Upon these several considerations, then, I submit, in conclusion, that the defendant cannot lawfully pay to the Directors of Providence Haspital, or to their principal (The Order of Sisters of Charity), or to any trustee for the use or benefit of either of them, any money belonging to the United States; and this, notwithstanding precedents, or acts of Congress, or contracts made under color of such acts, or warrants drawn by the Secretary of the Treasury, or any other officer of the Government. Because all statutes, contracts, and warrants purporting to authorize such payments are contrary to the manifest intent and meaning of the Constitution.

JOSEPH BRADFIELD, P. P.